Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

BON AIR HOTEL, INC., *Plaintiff,* v. TIME, INC. and DAN JENKINS, *Defendants.*	CIVIL ACTION No. 1171

ORDER

This is an action for libel allegedly arising out of an article in the April 6, 1964 issue of SPORTS ILLUSTRATED about the Bon Air Hotel.

The defendants have presented a Motion to Dismiss and alternative Motions for Summary Judgment.

The Motion to Dismiss offers as its first ground that the complaint fails to meet the constitutional standard imposed by the Supreme Court of the United States in *New York Times* v. *Sullivan* 376 U. S. 254 (1964) and *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967). The defendants claim that under these decisions the plaintiff is a public figure and must therefore allege the defendants' knowledge of falsity or high degree of awareness of probable falsity. To this allegation, the plaintiff submits that the Bon Air Hotel is not a "public figure" under the rule of *Butts,* and as such, should be allowed to continue its libel action free of the extra burden which the Constitution of the United States prescribes for "public figures." The Court agrees with the position taken by the plaintiff for the following reasons.

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In determining that the plaintiff is not a "public figure," this Court looks to the language of the *Butts* case where the Supreme Court said that Butts and Walker,

> ". . . commanded sufficient continuing public interest and had sufficient access to the means of counter-argument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." 388 U. S. 18 L. Ed. 2d 1111.

As pointed out in the plaintiff's brief: "It is easy to see that in the case of Butts and Edwin Walker the public was interested in their activities sufficiently to give them access to the means of counter argument. Walker and Butts were both often featured in magazine articles and in newspaper stories. They were featured in television and radio broadcasts. They were both interviewed by writers and news commentators. All of these things provide channels whereby public figures are able to present their side of any issue or charge to the public. It is equally clear that the Bon Air Hotel did not have such access to the means of counter argument. While in its long history the Bon Air Hotel may have been mentioned in news articles its news value could not compare to that of Butts and Walker. There is no way that an old hotel in the city of Augusta, Georgia could have at its command sufficient channels to the public to expose through argument and discussion libels made against it."

The second ground that the defendants offer for dismissal is that the plaintiff's complaint contains no allegation of special damages. It is the defendant's contention that the article complained of does not refer to the Plaintiff corporation, but only to its Hotel and plaintiff should not

be allowed to plead merely general damages because general damages will not be awarded for disparagement of plaintiff's property. The plaintiff contends that it is not necessary that special damages be alleged; because "statements which tend to injure one in his trade, occupation or business have been held to be libelous per se, and no allegation of special damages need be made to support an action for libel or slander based on such statements." *Walker* v. *Sheehan,* 80 Ga. App. 606, 611.

Therefore, the question presented to the Court is whether the statements made by the defendant were statements which tended to injure the plaintiff in its trade, occupation or business or whether the statements were made in disparagement of the plaintiff's property.

Among other things, the article in question in this case states words to the effect that the Bon Air Hotel management's attitude toward its guests is one of "stay-at-your-own-risk" and that the windows in the Bon Air Hotel are all stuck, either up or down. The article contains an illustration depicting the Bon Air Hotel as being in unsanitary condition. The sole business of the plaintiff was the proper, safe management of the hotel. Therefore, it is the opinion of the Court that the statements made by the defendant were statements which tended to injure the plaintiff in its trade, occupation or business and therefore, no allegation of special damages need be made by the plaintiff.

The third ground that the defendant offers is that a corporation may not sue for libel under Georgia law. Sections 105-701 and 105-703 of the 1933 Georgia Code Annotated, as amended, give a cause of action to "an individual." Although the Legislature of Georgia has not defined "individual," it has three times expressly included corpora-

tions within the term "person." *Ga. Code Ann.* Sections 22-101, 79-101, and 201-123 (1966).

There are no Georgia cases directly on point, however, plaintiff's brief cites several cases where the word "individual" included corporation: in bankruptcy proceedings, *In re United Button Co.* 132 Fed. 387 (N. Y. 1904); *In re New Era Novelty Co.*, 241 Fed. (N. H. 1916); in wills, *Georgetown College, Inc.* v. *Webb et al.* 313 Ky. 25, 230 S. W. 2d 84 (1950); in statutes, *National Accounting Co.* v. *Dorman*, 11 F. Supp. 872.

There are also cases where the Federal Courts allowed a corporation to maintain an action for libel. *Ohio and Mississippi Railroad Company* v. *Press Publishing Company*, 48 Fed. 206 (N. Y. 1891); *National Refining Co.* v. *Benzo Gas Motor Fuel Co.*, 20 F. 2d 763 (1927).

The United States Court of Appeals for the Fifth Circuit has also held that in respect to its credit, property, or business, a corporation can be injured by a false publication, and the publication may be libelous per se if it appears from the publication itself the words will directly so injure the corporation and result in pecuniary loss. *Mississippi River Fuel Corporation* v. *Charles A. O'Niell, Jr.* 230 F.2d 265 (1956).

For the foregoing reasons, it is the opinion of this Court that a corporation may maintain an action for libel.

Therefore, in accordance with the foregoing, it is hereby ORDERED that the defendants' Motion to Dismiss and alternative Motions for Summary Judgment be, and the same are, hereby denied.

It is so Ordered. This 20th day of December, 1967.

FRANK M. SCARLETT
Frank M. Scarlett
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

BON AIR HOTEL, INC., *Plaintiff*, v. TIME, INC. and DAN JENKINS, *Defendants.*	CIVIL ACTION No. 1171

AMENDED ORDER

Defendants having moved pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for judgment dismissing the complaint herein, and in the alternative for a motion for summary judgment pursuant to Rule 56 of said Federal Rules of Civil Procedure, and the Court having denied said motions on December 20, 1967; and

The Court being of the opinion that its order of December 20, 1967 involves a controlling issue of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation, it is

ORDERED, pursuant to 28 U. S. C. 1292(b) that all proceedings herein are stayed for a period of not less than ten (10) days from the date of said order to allow defendants time to apply for an appeal from said order, such stay to continue in effect until final disposition of such application and any appeal which may result therefrom.

This 23rd day of December, 1967.

F. M. SCARLETT
Frank M. Scarlett
United States District Judge

Appendix C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Misc. No. 944

SPORTS ILLUSTRATED

Petitioner,

versus

BON AIR HOTEL, INC.,

Respondent.

ON APPLICATION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY ORDER

Before WISDOM, BELL and DYER, Circuit Judges.

BY THE COURT:

Leave to appeal from the interlocutory orders of the United States District Court for the Southern District of Georgia, entered on December 20 and December 23, 1967, in this cause be and the same is hereby DENIED.

(ORIGINAL FILED—March 4, 1968)

Appendix D

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 944

TIME, INC. and DAN JENKINS,

Petitioners,

versus

BON AIR HOTEL, INC.,

Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

ON PETITION FOR REHEARING EN BANC
(April 30, 1968)

Before WISDOM, BELL and DYER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is DENIED.

(ORIGINAL FILED—April 30, 1968)

Appendix E

DAN JENKINS, being duly sworn, deposes and says:

I am an Associate Editor of SPORTS ILLUSTRATED Magazine, published by defendant Time, Inc., and a defendant in this action. I am co-author of the article on which this action is based. I make this affidavit in support of defendants' motions for summary judgment.

After I graduated from high school in 1948, I went to work as a sports reporter for the Fort Worth Press while I attended Texas Christian University. I have been a sports reporter ever since. By the time I graduated from college in 1953 I was writing a daily column. In 1957 I became Sports Editor which position I held until 1961 when I became a daily columnist and Sports Director for the Dallas Times-Herald. In January 1963 I joined the staff of SPORTS ILLUSTRATED and have been with them ever since. In 1966, my book, *The Best Eighteen Holes in America,* was published and early this year a book of which I was the ghost writer, *Arnie* by Mark McCormick, was published.

Throughout my career in journalism, I have specialized in writing articles in the sports field and have frequently written about golf and the background of golfing events and tournaments. In that capacity I have attended the Masters Golf Tournament each year since 1952. During those years I have stayed at several Augusta hostelries, including The Bon Air Hotel three or four times. I visited The Bon Air at least once during the course of each tournament I attended to participate in a function being held there, to visit friends or to conduct interviews.

In connection with the April 6, 1964, issue which was to be devoted largely to the Masters Golf Tournament, I was requested by Ray Cave, Senior Editor of SPORTS ILLUSTRATED and my immediate supervisor, to write an article

about the surroundings in which the Masters Golf Tournament is held.

I called for all of the information available to SPORTS ILLUSTRATED about Augusta and about the background of the Masters Golf Tournament. I reviewed my notes of prior Tournaments which I had attended and interviewed a great number of people, including such golfing celebrities as Frank Stranahan. As I went over the material, it became clear to me that the readers of SPORTS ILLUSTRATED would be interested in an article which dealt at least in part with the accommodations open to participants and spectators gathered in Augusta for the Tournament. I had vivid memories of my own experience at the Bon Air Hotel and recollections of the stories told by me by other persons whom I knew had also stayed at that hotel. I drew upon the accounts of experiences and anecdotes as related to me by a great number of people; those which I now recall are:

Name	Address
Jesse Outlar	Atlanta Constitution Atlanta, Georgia
James Turnesa	
Robert Drum	Virginia Military Institute
David McCahill	San Juan, Puerto Rico
James Murray	Los Angeles Times Los Angeles, California
Ben and Valerie Hogan	Fort Worth, Texas
Byron and Louise Nelson	Fairway Ranch Roanoke, Texas
Charles Bartlett	Chicago Tribune Chicago, Illinois
Art Wall	Pocono Manor, Pennsylvania
Edwin Shrake	Time Incorporated Time & Life Building New York, N. Y.

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Name	Address
Frank R. Stranahan	Phoenix, Arizona
Herb Graffis	Publisher, Golfing Magazine Chicago, Illinois
James Trinkle	Fort Worth Star Telegram Fort Worth, Texas
Oscar Fraley	Associated Press New York, N. Y.
Will Grimsley	Associated Press New York, N. Y.
David Eisenberg	
Gene Gregston	San Diego Tribune San Diego, California
Dudley Green	Nashville Banner Nashville, Tennessee
Blackie Sherrod	Dallas Times-Herald Dallas, Texas
Warren Koon	The News and Courier Charleston, South Carolina
Irwin Smallwood	Greensboro, North Carolina
Thomas McEwen	Tampa Tribune Tampa, Florida
Howard Gill	Golf Digest Chicago, Illinois
Ernie Vossler	Quail Creek Country Club Oklahoma City, Oklahoma
Claude Harmon	Winged Foot Country Club Mamaroneck, N. Y.
Mike Souchak	Durham, North Carolina
Jack Burke	Champions Club Houston, Texas
Pat McDonough	Pittsburgh, Pennsylvania

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Relying upon all of those sources and the other research I had done, I drafted an article and, and more than a month before the deadline, submitted it for editorial revision to Ray Cave and for further research by the research department. The researcher assigned was Miss Sarah Pileggi who checked the article pursuant to her normal procedures, as outlined in her affidavit in support of these motions. She checked each fact and returned the copy for further revision by Ray Cave and me. We discussed the article as it appeared and several corrections and revisions were made in it. The article was then deemed ready for publication and was published in the April 6th, 1964 issue of SPORTS ILLUSTRATED.

On the basis of my own knowledge, my notes, interviews I had with other persons and the research performed by me and the Research Department, particularly Miss Pileggi, I believed the story to be true in every detail at the time it was written. Today I still believe it to be true. In so far as the article consisted of comment, I believed the comments to be fair and today still believe such comments to have been fair. Every statement in the paragraph was supported and I was aware of no fact which cast any doubt on any statement in the article.

[Sworn to October 9, 1967]

Appendix F

SARAH PILEGGI, being duly sworn, deposes and says:

I am a Reporter for SPORTS ILLUSTRATED and at the time of the article about which this action is concerned was such a Reporter. My duties as a Reporter include primarily the verification of each fact in the article which is assigned to me.

After an editor or other author has written an article for publication in SPORTS ILLUSTRATED, a copy of his draft is sent to the Research Department, which is under the supervision of Honor Fitzpatrick, for vertification of all facts contained therein. Miss Fitzpatrick assigns a member of the Department to perform the actual research required on the article. I was so assigned to perform the necessary research on the article written by Dan Jenkins for the April 6, 1964, issue of SPORTS ILLUSTRATED.

I checked some of the facts in the morgue files of Time, Inc., verified the data through other published sources and made various telephone calls to ascertain the accuracy of other statements in the article. In particular, I perused several volumes on the history of Georgia, especially as it related to the territory immediately surrounding Augusta. I conferred several times with Dan Jenkins and Ray Cave, Senior Editor of SPORTS ILLUSTRATED, who was supervising the editing of the various articles that appeared in the April 6, 1964, issue devoted largely to the Masters Golf Tournament. Further, I interviewed by telephone persons who were quoted or referred to in the article, including but not limited to Jesse Outlar, David McCahill and Mrs. Esther Mewhisen, and checked Mr. Jenkins' notes of his interviews. Finally, I consulted various books and magazines concerning statements of fact about golf, golfing tournaments and the golfing profession. As an example of the type of in-

formation I requested from sources deemed to be trustworthy, attached as Exhibit 1 are a Query Sheet dated March 17, 1964, addressed to Jim Minter of the Atlanta Journal and his cabled replies of March 17, 1964, and March 18, 1964. Also attached as Exhibit 2 are a cable dated March 18, 1964, and a letter, both received from Mrs. Esther Mewhisen.

As a result of my research at the time I handed Mr. Jenkins' copy back to him, I believed each statement which I had checked to be true and I still believe each such statement to be true.

[Sworn to October 9, 1967]

Appendix G

The petition alleged that 10 statements about the Bon Air in the article were false and libeled plaintiff (D. 4-5). Those statements are: (1) the Bon Air Hotel has a "whitewashed face"; (2) the Bon Air Hotel is staffed with ancient waiters in white coats who "tumble drowsily through the dining room"; (3) the Bon Air Hotel management's attitude toward its guest is that of "stay-at-your-own-risk"; (4) the Bon Air Hotel is being gradually converted into a "residence for the elderly"; (5) halls "sloped awkwardly" toward the rooms; (6) rooms are "wide enough so that by turning sideways a guest can walk between the bed and the dresser"; (7) windows are as follows: "Windows are of two types. If, upon entry, a window is up it is not likely ever to come down, especially if the evening is brisk. On the other hand, if the window is down, it will never go up."; (8) tubs and basins were never "worth much"; (9) sleeping accommodations are described: "Sleeping at the Bon Air has long been difficult, for reasons other than the heat or the cold or the hardness of the beds. It is noisy. Not the least amount of noise sometimes is caused by the clacking of highheeled shoes going down the fire escape outside a guest's window at 4 a.m."; and (10) the Bon Air Hotel has a "sellout crowd" for the week of April 6 through April 12, 1964. The petition also objects to a drawing of the Bon Air at the beginning of the article (D. 6).*

*Plaintiff has not challenged the accuracy of 29 other statements in the article about the Bon Air (D. 10-15): (1) "the almost always dry cavern of its own swimming pool"; (2) "The pool . . . has occasionally been filled in Masters week, filled with green water on which floated paper cups and hats and other strange baubles"; (3) "In 1961 a motorboat sat foolishly on the surface with a sign that said 'Mutimer for Sheriff.' (Mutimer won.)"; (4) "Owners of the property . . . may come and go, and hotel managers may do the same, but the building stays"; (5) "For the past four years the Bon

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The author was Dan Jenkins, Associate Editor of *Sports Illustrated,* former Sports Director for the *Dallas Times-Herald,* and an active sports reporter since 1948 (D. 67). It is standard *Sports Illustrated* procedure to have a reporter from the Research Department verify the facts in

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Air has been closed most of the year reopening only for the Masters"; (6) "The sofas and chairs still needed reupholstering"; (7) "the chandeliers still had not been dusted since Bobby Jones defeated Eugene Homans at Merion"; (8) "the carpet on the stairs was thin as a shirtsleeve"; (9) "In far-off corners of the sprawling lobby were drooping potted palms that needed water even more than the swimming pool"; (10) "Long jagged scars crawled across the plaster ceiling"; (11) "In other years the plaster had been peeling, if not dripping—at times in frightening chunks"; (12) "rooms numbered in such fascinating sequences as 352, 353, 362"; (13) "The bathroom was usually shared with a family of four from Savannah"; (14) "The basin would not have any hot water"; (15) "the tub would have only in-between water"; (16) "In either case, the water gushed out of the faucets with the fury of eyewash from a dropper"; (17) "The water had variety. There was burnt-orange water, pink water, red water and water with lumps in it"; (18) "there would be no towels"; (19) "And no one, of course, wanted to waste the one tiny sliver of soap, most likely left behind by some carpetbagger"; (20) "Bon Air maids are where you find them, and they usually respond to any plea by locking the guest in his room"; (21) description of an incident when Jim Turnesa, former PGA champion, was locked in his room by a maid and a carpenter had to remove the door to free Turnesa; (22) description of an incident when Bob Drum, a former newspaper man from Pittsburgh, lost a suit for two weeks at the Bon Air valet shop; (23) description of an incident when Bud Shrake, a writer from Dallas, lost a pair of shoes at the Bon Air valet shop for several days; (24) "when Shrake wrote a newspaper column about his Bon Air misadventures the management congratulated him on his accuracy and posted the story in the lobby."; (25) "the safest way to spend an evening was to take a burnt-orange sponge bath, dry off on a bedsheet and lie down to listen to the argument in the next room."; (26) "The Bon Air lost its status as official host to the players, exhausted the means and patience of three ownerships, went bankrupt in 1960 and has opened and closed four times since—always on behalf of the Masters."; (27) "Now it is open again, with 15 elderly guests who are trying its retirement charms"; (28) "It will even have linen service this year—unlike 1963."; and (29) "But rooms will not have telephones."

every article (D. 4, 73). Sarah Pileggi was assigned to perform the research task on this article. *Id.*

Of the 10 statements about which the Bon Air complains, Dan Jenkins, who had attended the Masters each year since 1952, visited the Bon Air every year, and stayed there three or four times, had personally experienced the conditions that were the basis for six: elderly waiters, sloping halls, tiny rooms, stuck windows, inadequate plumbing, and noise from people on the fire escapes. (D. 47-8, 68-70). An inquiry by Miss Pileggi about the accuracy of the statements concerning the sloping halls, tiny bedrooms and bathrooms led to a check by Atlanta Journal reporter Jim Minter, who confirmed the accuracy of the statements (D. 74, 79).* The seventh statement, Jenkins' comment about the "stay-at-your-own-risk attitude" of the Bon Air, was a reasonable—even inevitable—conclusion from the facts discussed in the article about conditions at the Bon Air.

Of the remaining three statements to which Bon Air objects, one, the hotel has a "sellout crowd" for Masters Week, has no conceivable defamatory meaning. The objection, in paragraph 9(d) of the petition (D. 5), to the statement in the article that the Bon Air is being gradually converted into a residence for the elderly, is difficult to understand since paragraphs 6 and 21(a) of the petition describe the Bon Air as a "retirement hotel" (D. 4, 21), and the affidavit of the Bon Air's president states that Bon Air Hotel, Inc. was formed to purchase the Bon Air and convert it into a "retirement hotel" and "community within itself

*Indeed, plaintiff's charge that these statements are false seems to be based on an unusual theory of falsity. The affidavit of Richard Olivere, president of plaintiff, states that the statement in the article that the tubs and basins at the Bon Air were never worth much is false "because the basins and tubs were of good quality when installed" (D. 96-7).

for retired persons" and that Bon Air Hotel, Inc. advertised "inviting retired persons to apply" (D. 95). The sources for this statement in the article: a dispatch from Jim Minter, a reporter for the *Atlanta Journal*, that the "primary use of hotel is retirement home for senior citizens" and "Manager A. A. Tate reports he now has 15 elderly guest [sic]" (D. 76); and a dispatch from Mrs. Esther Mewhisen, the *Atlanta Journal's* Augusta correspondent (D. 79), that the hotel was "in the process of converting to an efficiency place for retired persons" (D. 81). Finally, the Bon Air objects to the phrase "whitewashed face", an expression Jenkins used to describe the color of the hotel's facade which he had visually inspected. Miss Pileggi specifically checked this fact; in a query to Jim Minter in Georgia she asked, "Does it have a whitewashed exterior? If not, what color?" (D. 74), and Minter replied, "Exterior of Bon Air is Spanish stucco, white-yellowish color, according to eyewitnesses." (D. 77). The color was further confirmed in dispatches from Esther Mewhisen which stated, "Hotel now being painted outside white" (D. 80), and, "The outside of the hotel has been repainted a dazzling white" (D. 81).

The drawing, showing one corner of the Bon Air supported by poles, was drawn by Marc Simont (D. 87, 99). Simont, who had visited Augusta during the Masters in 1963, returned to Augusta on this assignment and visited the Bon Air on three occasions (D. 99, 104). Simont received the general impression that the Bon Air was in disrepair, and, as he explained to the editors of *Sports Illustrated*, he attempted to convey this condition in the picture through the poles supporting the building (D. 105-6).